PP

v.

SUHERNI KARIM & ORS

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CRIMINAL APPEAL NO: Q-05-11-2011]
25 OCTOBER 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Deceased knocked head against wooden post and fell off from bicycle - Whether accused persons inflicted injuries which caused death of deceased - Whether dying declaration considered - Whether accused persons inflicted injuries with intention under s. 300(a), (b), (c) and (d) - Whether alternative charge under s. 304 Penal Code considered*

EVIDENCE: *Witness - Statement by - Whether accused persons inflicted injuries which caused death to deceased - Whether injuries caused due to knock on head against wooden post when deceased fell from bicycle - Whether dying declaration considered - Whether statement admissible under s. 32 Evidence Act 1950*

Four accused persons were jointly charged with an offence under s. 302 of the Penal Code ('PC') read together with s. 34 of the PC for the murder of one Dick Collin bin Kumeng ('deceased'). The accused persons were also faced with an alternative charge under s. 304(a) of the PC. On 7 January 2010, all the accused persons were having a drink at a coffee shop. PW9 and PW10 were also having drinks in the coffee shop next door. PW9 and PW10 testified that they saw the deceased and the first and third accused quarrelling on the particular night. PW9 and PW10 stopped them from quarrelling and the deceased went home. About an hour later, PW9 and PW10 saw the deceased coming back riding a bicycle along a small bridge carrying a parang in its sheath. After hearing some loud noises of fighting coming from the direction of the bridge, PW9 and PW10 went over to the bridge to stop the fight. PW9 testified that he saw the first accused strangling the deceased and the second accused whipping the deceased with a belt. When the deceased tried to escape, the first accused pushed the deceased and the deceased fell down from his bicycle. The first and second accused then continued to beat the deceased at the place where he fell. The first and second accused stopped beating the accused when the deceased surrendered. The deceased was admitted to the hospital and had informed his mother ('PW7'), his two aunts ('PW5') and ('PW6') and his brother ('PW4') that it was the four accused persons who had

beaten him and that the third accused had hit the deceased with a handle of a mop to his head and waist. The deceased died and the post mortem stated that the cause of death was due to intracranial haemorrhage due to blunt head injuries. The trial judge concluded that the deceased died as a result of the injuries sustained and held that the prosecution had failed to prove that the accused persons had the required *mens rea* under s. 300(a), (b), (c) and (d) of the PC for the offence charged. Instead, the trial judge found that a *prima facie* case had been established against the accused persons for an offence under s. 323 of the PC and amended the charge to one under s. 323 of the PC read with s. 34 of the PC. The trial judge relied on eye witness accounts of PW9 and PW10 and the statements made by the deceased before his death to PW7, PW5, PW6 and PW4 which was admitted under s. 32 of the Evidence Act 1950. Hence, this appeal. The prosecution argued that (i) the trial judge had not considered the alternative charge under s. 304(a) of the PC; (ii) the trial judge's finding that the injury to the deceased head could have been caused when his head knocked against the wooden post or base of the post as he was falling off his bicycle near the school was an inference made from other facts and circumstances. In the absence of direct evidence of the cause of the injury to the deceased head, the prosecution submitted that the deceased's dying declaration that he had been hit on the head by the third accused with a mop handle, should have been relied on by the trial judge. The issues that arose for determination were (a) whether it was the accused persons who had inflicted the injuries which caused the death of the deceased; and (b) whether the accused persons had inflicted the injuries with the intention as prescribed by s. 300(a), (b), (c) or (d) of the PC.

Held (dismissing appeal; affirming decision of the High Court)
Per Clement Skinner JCA delivering the judgment of the court:

(1) The trial judge admitted the deceased dying declaration as part of the evidence but had gone further to determine if the intracranial haemorrhage which was the cause of death was caused by the injury inflicted by the third accused. Having evaluated all evidence, the trial judge found that it was probable that the fatal injury was caused when the deceased's head was knocked against the post or base posts upon falling from the bicycle. The trial judge had not erred and the inference which the trial judge drew from the facts and circumstances were not perverse against the weight of evidence so as to warrant appellate interference. (paras 33 & 34)

(2) Section 300(c) of the PC required an intention to cause bodily injury which was sufficient in the cause of nature to cause death. There was no evidence that any of the injuries were sufficient to cause death. Although the cause of death was due to intracranial

haemorrhage due to blunt head injuries, it was probable that such injury was not caused by the accused persons. Accordingly, s. 300(c) of the PC did not apply. (para 36)

(3) An essential ingredient to be proved in establishing a *prima facie* case under s. 304 was that the accused persons had caused the death of the deceased. The medical reports showed that the cause of death was intracranial haemorrhage due to blunt head injury and the trial judge found that it was probable that the injury was not caused by the accused persons but was sustained when the deceased fell from his bicycle and knocked his head on the post. Even if the trial judge had properly directed her mind to the alternative charge, the trial judge would not have called the accused persons to enter their defence. As such, there was no reason to interfere with the decision of the trial judge. (paras 38 & 39)

Case(s) referred to:
Virsa Singh v. The State Of Punjab AIR 1958 SC 465 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399
Evidence Act 1950, s. 32
Penal Code, ss. 34, 300(a), (b), (c), (d), 302, 304(a), 323

For the prosecution - Awang Armadajaya Mahmud; (Cyril Chandradasa with him); DPPs
For the 1st and 3rd respondents - Wee Wui Kiat
For the 2nd respondent - Maj (Rtd) Osman Ibrahim
For the 3rd respondent - Augustine Liom

[Appeal from High Court, Sibu; Criminal Trial No: 45-6-2010]

Reported by Sandra Gabriel

JUDGMENT

Clement Skinner JCA:

[1] We had earlier heard this appeal by the public prosecutor and dismissed it. These are our reasons for doing so. We find it more convenient to refer to the parties as they were in the court below. Thus we shall continue to refer to the respondents as the accused persons.

Brief Facts

[2] The four accused persons Suherni bin Karim ("the first accused"), Mohd Sayuti bin Karim ("the second accused"), Mohamad Mawajudeen bin Omar ("the third accused") and Karim bin Bujang ("the fourth

accused") were jointly charged with an offence under s. 302 of the Penal Code. The charge reads:

> Bahawa kamu bersama-sama pada 07 Januari 2010 pada jam lebih kurang 9.45 malam di Pasar Sungai Kut di dalam Daerah Dulat di dalam Negeri Sarawak dengan niat bersama telah membunuh Dick Collin Bin Kumeng dan dengan itu kamu melakukan kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan dibaca bersama s. 34 Kanun yang sama.

[3] The accuseds also faced with an alternative charge under s. 304(a) of the Penal Code.

[4] All the accused persons claimed trial.

[5] The evidence led in the case for the prosecution shows that on 7 January 2010 at about 7.30pm, all the four accused persons were having a drink at a coffee shop called Kong Tai San. The first and second accuseds are the sons of the fourth accused, while the third accused also known as "Ciko" is the fourth accused's nephew. On the same date, time and place, Kenny Dalglish bin David ("PW9") and Mazlan bin Sellon ("PW10") were having drinks in the coffee shop next door called Tai Soon Lee. PW9 and PW10 gave similar evidence at the trial. They testified that at about 8.30pm on the night in question they saw the first and third accuseds together with Dick Collin Bin Kumeng ("the deceased") go off towards a small bridge near the public toilet at Sg Kut Bazaar. PW9 and PW10 then heard the sound of people quarrelling near the public toilet. PW9 and PW10 went there and saw the two accuseds and the deceased quarrelling, so they stopped them from quarrelling. When the quarrelling stopped, the deceased went home while the first and third accused went back to the shop Kong Tai San to rejoin the second and fourth accuseds.

[6] After their drinks all the fourth accused persons went back to their houses which were across the river from Sg Kut Bazaar. They all went back in a boat. PW9 and PW10 continued to remain at the shop Tai Soon Lee.

[7] About an hour later PW9 and PW10 saw the deceased coming back to Sg Kut Bazaar riding a bicycle along a small bridge leading from his house. The deceased was carrying a parang in its sheath (exh. P27). The deceased parked his bicycle in front of shop Tai Soon Lee, took out the parang from its sheath and walked towards a jetty in front of Sg Kut Bazaar. This jetty was known to the locals as the "the fourth bridge" or the "Chee Seng bridge". From somewhere near the fourth bridge the deceased was heard calling out loudly, three times in Melanau, "where are you all just now?".

[8] PW9 and PW10 testified that about 15 minutes later, they heard the sound of a motorboat crossing the river and stop at the fourth bridge. They then saw the third accused Ciko running towards the fourth bridge from the direction of the public toilet at Sg Kut Bazaar.

[9] PW9 and PW10 then heard loud noises of fighting coming from the direction of the fourth bridge so they went there to stop the fighting. PW9 said he saw the first accused Suherni strangling the deceased (and demonstrated the manner in court) and the second accused Sayuti whipping the deceased with a belt (exh. PE1(a)). PW9 and PW10 did not see the third accused Ciko and the fourth accused Karim doing anything.

[10] When the fight was stopped PW9 and PW10 saw the deceased walking back towards where his bicycle was parked but the first and second accused followed the deceased, continuing to beat him on the back with their fists and belt. At this point the third and fourth accused were standing at the back and not doing anything.

[11] On reaching his bicycle the deceased started to cycle back to his house (along the small wooden bridge) but the first and second accused chased after him. The first accused pushed the deceased causing him to fall down from his bicycle in front of SJK (C) Pok Yuk ("the school"). The first and second accuseds continued to beat the deceased at the place where he fell. They allegedly beat him on his head with their bare fists. The deceased then surrendered to the first and second accuseds by saying "I lose", whereupon they stopped beating him. At this point in time the third and fourth accuseds were at the Tai Soon Lee shop and took no part in the fight in front of the school.

[12] The four accused persons then went back home across the river, while the deceased went to his aunt's house and slept the night there. The next morning, ie, 8 January 2010 the deceased's mother Mary Binti Dab (PW7) had difficulty waking up the deceased. PW7 testified that she noticed bruises all over the deceased's body and thought he had fallen off his bicycle so she went to look for his bicycle at the bazaar, where she was informed by someone there about the deceased being beaten up by Karim and his group. So PW7 went to Karim's (fourth accused's) house to ask him about the matter and was allegedly informed by the fourth accused that her son was beaten by Johari's son Ciko, Ayen, Karim and Ali.

[13] PW7 then returned to her sister's house accompanied by the fourth accused. At the house the fourth accused allegedly kept asking PW7 not to have the deceased admitted to hospital as he did not want people to see the marks on the deceased's body.

[14] While at the house the fourth accused tried to lift the deceased to give him some medicine but the deceased who was very weak refused to be lifted or to take the medicine from the fourth accused. Instead the deceased told his aunt Norziana Binti Rahim @ Illus Binti Dab (PW5) that it was the fourth accused who had beaten him the night before and when refusing water from the fourth accused said to him in Melanau:

> You are the one who beat me last night. You don't have to give water to me. You are the one who strangled my neck and it was painful.

The evidence shows that the deceased was eventually admitted to hospital on 8 January 2010 at about 12 noon with the help of several persons including the fourth accused.

[15] During his admission to hospital, in response to PW7's questions the deceased told her that "Karim, Ciko, Ayen and Ali" had beaten him. He said Ciko used the handle of a mop to hit his head and waist causing it to break. Ali and Ayen came and hit his body with a belt. It started at the bridge. Then he went home. They stopped beating him after he cried out "stop, stop I am already painful". The deceased told PW7 he had not done anything wrong.

[16] Prior to the above conversation, PW7 testified that she had heard the doctor at the ward asking the deceased what had happened to his body with bruises on it and she heard the deceased reply, "I have been beaten by Karim and his friends". The doctor asked for the names and the deceased replied "Karim, Ciko, Ayen and Ali, these four".

[17] Another aunty of the deceased, Hairony @ Aseng Binti Dab PW6, testified that while at the hospital she asked the deceased what happened to him to which he replied in a weak voice, "Saya kenak pukul, kenak tumbuk, kenak tendang dan kenak cekik". PW6 also said when the deceased was given some water to drink he said he could not swallow as "I was strangled by Karim last night". The deceased also informed PW6 that "Ciko" hit his ears and "anak Karim" hit his waist and back with a belt. Ciko used a stick. PW6 testified that she asked the deceased many times who hit him and the deceased gave the same answer in Melanau: "I was beaten, hit, kicked, knocked and strangled by Karim and his friends" or "I was beaten, hit, kicked, knocked and strangled by Karim's people". "They used broom stick, belt, punched by hands and kicked by legs".

[18] The deceased's brother, Kazarie Kumeng Abdullah PW4, gave evidence to the same effect. He testified that while at the hospital, the deceased informed him that on the night of 7 January 2010 Karim, Ciko, and Karim's two sons beat him at the Sg Kut Bazaar.

[19] On 9 January 2010 the deceased passed away at about six am. The doctor who performed a post-mortem on the deceased on 14 January 2010 was Dr Jamil Dolkadir. But he was not called as a witness at the trial. Instead the prosecution served a copy of his medical report on the accused persons before the trial, pursuant to s. 399 of the Criminal Procedure Code. The Investigating Officer Insp Makkaranu Bin Beddu (PW11) tendered the medical report in evidence which was marked exh. P23.

[20] The medical report shows that on Dr Jamil's external examination of the deceased, the following injuries were seen: (i) Three linear abrasions at right forehead measuring about two cm long; 0.2 cm wide each; (ii) One linear abrasion at left upper lateral neck measuring one cm long, 0.2 cm wide; (iii) Bruises at middle sternum; (iv) Bruises at left lower chest; (v) Abrasion at left groin; (vi) Abrasion at left knee; (vii) Abrasion at below right knee; (viii) Abrasion at lateral left upper arm; (ix) Abrasion at lateral left lower arm; (x) Abrasion at left scapula area; (xi) Abrasion at left elbow; (xii) Abrasion at right elbow and posterior right lower arm. No other injuries were seen.

[21] On internal examination the medical report states:

> Central Nervous System
> On opening up of the scalp skin there was hematoma below the skin at Vertex occipital and bilateral temporal area. On opening up the skull, there was some subdural haemorrhages at right posterior cerebrum. No fracture of skull noted. On cutting up the brain was normal.
>
> The medical report states that examination performed on the internal body, respiratory system, cardiovascular system, gastrointestinal system, genitourinary system, endocrine system revealed nothing unusual.
>
> On the "cause of death" the report states: "Intracranial haemorrhage due to blunt head injuries".

High Court Findings At Close Of Prosecution's Case

[22] The learned High Court Judge found there was sufficient evidence to prove the death of Dick Collin bin Kumeng. The learned judge also found that the deceased had died as a result of the injuries sustained by him. However, with regard to the question whether it was the accused persons who had inflicted the injuries which caused the death of the deceased and whether the accused persons had inflicted the injuries with the intention or knowledge mentioned in ss. 300(a), (b), (c) or (d) of the Penal Code, the learned judge came to a finding of fact that a *prima facie* case had not been established against the accused persons on these two elements or ingredients of the offence charged.

[23] The learned judge came to such findings for the following reasons. With regard to the question whether the accused persons had inflicted the injuries found on the deceased, the learned judge found that there was sufficient evidence adduced to show that on the night of 7 January 2010 the first, second, third and fourth accused persons had fought with and assaulted the deceased. The learned judge relied on the following evidence to arrive at that finding: (a) the eye witness accounts of PW9 and PW10 and (b) the statements made before his death by the deceased to his relatives, namely, PW7, PW5, PW6 and PW4 that it was the accused persons who had caused the injuries found on his body and how they were caused. The learned judge admitted these statements made by the deceased as his "dying declaration" as she was satisfied that the provisions of s. 32 of the Evidence Act 1950 had been fulfilled.

[24] However, the learned judge entertained a reasonable doubt on whether the accused persons had inflicted the injuries which caused the deceased's death.

[25] The learned judge said the medical report (exh. P23) states that the deceased suffered three linear abrasions to his right forehead and the cause of death was intracranial haemorrhage. The learned judge also said that in his dying declaration, the deceased had identified the third accused "Ciko" as the person who used the handle of a mop to hit his head. But the learned judge noted that the defence case which was put to PW9 and PW10 during their cross-examination was that when the deceased fell off his bicycle at the bridge next to the school after he was pushed by the first accused, the deceased had knocked his head against the wooden fencing posts or the foundation of these posts which was made of concrete or wood, thereby causing the injuries to his forehead. Therefore, the learned judge said the critical question to be asked is whether the head injuries found on the deceased were caused by "Ciko" or were they caused when the deceased fell off his bicycle at the bridge?

[26] Although PW9 had said in his cross-examination that he did not see the deceased's head hit the ground when he fell off the bridge and PW10 had said he was not sure whether the deceased's head had hit anything on the deceased falling off the bridge, the learned judge reviewed the evidence on the point and came to a finding of fact that it was not improbable that when he fell, the deceased's head could have knocked against the fencing post or the wooden base of the posts, which caused the injuries to the deceased's forehead. The learned judge based her finding on the following evidence: (a) the photograph (exh. P9(18)) of the place where the deceased fell off his bicycle which shows that the distance between the bridge and the fencing posts was very narrow, (b) the photograph of the deceased's bicycle exh. P9(17) which shows that its front wheel was twisted which indicated that the deceased's fall

from the bridge with his bicycle must have been with some force, causing the wheel to twist, (c) the abrasions on the deceased's head are entirely consistent while his head having hit the fencing post or the base of the posts when he fell off his bicycle at the bridge.

[27] Accordingly the learned judge found at p. 26 of her judgment that since there are two possible causes of the abrasions found on the deceased's forehead, and since it is the law that where more than one inference can be drawn from the facts, the inference most favourable to the accused should be drawn, the learned judge drew such an inference that favoured the accused persons and held that the prosecution had failed to prove that the injury that caused the deceased's death was caused by the accused persons.

[28] With regard to the question whether the prosecution had proved that the accused persons had the necessary *mens rea* under ss. 300(a), (b), (c) and (d) of the Penal Code to commit the offence charged, the learned judge found that this ingredient had not been proved for the following reasons: (a) no dangerous weapons had been used. Although there was evidence that a belt and a mop handle were allegedly used, there was no evidence that these items were dangerous weapons that could cause death, (b) the deceased was seen going off to challenge the accused persons with a parang which he must have been disarmed off during the fight at the fourth bridge. Therefore the parang could have been used on the deceased by the accused persons had they intended to cause his death or inflict bodily injuries on him but this was not the case, (c) the evidence shows that after the deceased had fallen off his bicycle next to the school, the first and second accused continued to assault him but the moment the deceased had said "I lose", they stopped beating him which, according to the learned judge, indicated that they had no intention to cause death otherwise they would have continued beating the deceased instead of allowing him to walk back home, and (d) in the absence of any medical evidence whether the injuries found on the deceased were sufficient in the ordinary course of nature to cause death, it was difficult to infer the necessary intent or knowledge against the accused persons.

[29] Accordingly, at the end of the prosecution's case the learned High Court Judge found that no *prima facie* case had been made out against the accused persons for the offence charged. Instead the learned judge found that on the evidence, a *prima facie* case had been made out against the accused persons for an offence under s. 323 of the Penal Code. The learned judge therefore amended the charge to one under s. 323 read with s. 34 of the Penal Code. On the amended charge being read to them all the accused persons pleaded guilty thereto and were each sentenced to 11 months imprisonment. Hence this appeal by the PP.

A **This Appeal**

[30] The PP has raised two issues in this appeal, namely, (a) whether the dying declaration may be relied on to determine the person(s) that caused the death of the deceased, and (b) whether there was any intention to commit murder as defined by s. 300 of the Penal Code.

B

[31] With regard to the deceased's dying declaration, the learned Deputy Public Prosecutor ("DPP") contended that the deceased was conscious and lucid when he described to the witnesses earlier mentioned, the beatings he suffered and the identity of his assailants.
C Therefore the learned DPP submitted that the deceased's dying declaration should be admitted and used as substantive evidence in this case.

[32] The learned DPP contended that the learned judge had reduced
D the charge against the accused persons as she found that it was probable that the injury to the deceased's head could have been caused when his head knocked against the wooden post or base of the post as he was falling off his bicycle near the school. According to the learned DPP, such finding made by the learned judge was an inference made from other facts and circumstances. In the absence of direct evidence of
E the cause of the injury to the deceased's head, it was the learned DPP's submission that the deceased's dying declaration that he had been hit on the head by "Ciko" with a mop handle, should have been relied on by the learned judge.

F **[33]** We do not agree with this submission. A reading of her judgment shows that the learned judge did admit the deceased's dying declaration as part of the evidence in this case. In our judgment, upon the dying declaration being admitted into evidence, the matter did not end there. Whilst the learned judge would have been entitled to act on the declaration of the deceased that he was hit on the head by "Ciko" using
G a mop handle, the learned judge had a duty to go one step further to ask herself whether the intracranial haemorrhage which was the cause of death, was caused by the injury allegedly inflicted by "Ciko", or, was that injury caused when the deceased's head knocked against the post or base of the posts next to the school? As the judgment of the learned
H judge shows, she did ask herself that question and having evaluated all the evidence before her in that regard, the learned judge came to a finding, for the reasons given by her that, it was probable that the fatal injury was caused when the deceased's head knocked against the post or base of the posts on his falling off his bicycle at the school.

I

[34] We do not find any error in what the learned judge did. Neither do we find the inferences which the learned judge drew from the facts and circumstances referred to by her, to be perverse in any way or against the weight of evidence so as to warrant appellate interference.

[35] With regard to the second issue raised by the learned DPP, it was contended that the prosecution had proved the elements of s. 300(c) of the Penal Code ie, the act by which the death was caused was done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In support the learned DPP relied on the Indian case of *Virsa Singh v. The State of Punjab* AIR 1958 SC 465 at p. 467 which dealt with the requirements under cl. 3 of s. 300 of the Indian Penal Code which is in *pari materia* with cl. (c) of s. 300 of the Malaysian Penal Code.

[36] We do not agree with the learned DPP's contention. Section 300(c) requires an intention to cause bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. We agree with the finding of the learned judge that the facts and circumstances which were referred to by her indicate that the accused persons were alleged to have used their fists, a belt and a mop handle to cause bodily injury to the deceased but there is no evidence from any medical source or when viewed objectively that any of the injuries found on an external examination of the deceased were sufficient in the ordinary course of nature to cause death. Further, the cause of death was the intracranial haemorrhage due to blunt head injuries, but as the learned judge found, it is probable that such injury was not caused by the accused persons. We find accordingly that s. 300(c) of the Penal Code would not apply to the facts of this case.

[37] The learned DPP also complained that the learned trial judge had not considered the alternative change under s. 304(a) of the Penal Code at all. According to the learned DPP at the very least the learned judge should have called all the accused persons to enter on their defence to the alternative charge under s. 304(a).

[38] We do not agree. Although the learned judge did not consider the alternative charge, we find her failure to do so did not occasion a miscarriage of justice. The learned DPP concedes that an essential ingredient to be proved in establishing a *prima facie* case under s. 304(a) is that the accused persons had caused the death of the deceased. However, the medical report exh. P 23 shows that the cause of death was intracranial haemorrhage due to blunt head injury. And the learned judge found that it is probable that such injury was not caused by the

A accused persons but was sustained when the deceased fell from his bicycle and knocked his head against the post or foundation of the posts near the school. In the circumstances we find that even if the learned judge had properly directed her mind to the alternative charge, she would not have called the accused persons to enter on their defence to
B the same.

[39] In the result we find no reasons to interfere with the decision of the High Court Judge which we affirm, and dismiss the appeal of the PP.

C

D

E

F

G

H

I